SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 366

AMERICAN INVESTORS FUND, INC.,

Petitioner,

v.

ROSALIND FOGEL and GERALD FOGEL,

Respondents,

and

GEORGE A. CHESTNUTT, JR., JOHN CURRIER, FRANK G. FOWLER, JR., WARREN K. GREENE, RICHARD W. RADCLIFFE, STANLEY L. SABEL, ELIZABETH SULLIVAN, FRANCIS L. VEEDER, AMERICAN INVESTORS CORPORATION, CHESTNUTT CORPORATION, THE FUND OF FUNDS, LTD., I.O.S., LTD. (S.A.) and JESUP & LAMONT,

Defendants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF PETITIONER FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING

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MOTION OF PETITIONER FOR LEAVE TO FILE A PETITION FOR REHEARING

Petitioner, by its counsel, moves this Court to grant leave to file a petition for rehearing of denial by this Court of a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

The accompanying petition sets out an intervening circumstance of substantial and persuasive importance for granting the petition for rehearing and for a writ of certiorari.

The petition for a writ of certiorari was denied on October 9, 1967. Subsequent to that time this Court granted certiorari in No. 486, *Stern* v. *South Chester Tube Company.*

Jurisdiction of this Court to grant petitions for rehearing which were filed after the expiration of the time prescribed by the Rules of this Court is recognized in *United States* v. *The Ohio Power Co.*, 353 U. S. 98, which case also recognized the considerations which move this Court in the exercise of its discretion to grant petitions for rehearing filed after the time within which they may be filed as a matter of right under Rule 58 of this Court.

That the exercise by this Court of its jurisdiction would be proper is also recognized by *Bradley Mining Co.* v. *Boice*, 345 U. S. 932; *Land* v. *Dollar*, 330 U. S. 731; *United States* v. *General Motors*, 323 U. S. 373; and *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U. S. 541.

We submit that the accompanying petition for rehearing should be accepted for filing and granted.

Respectfully submitted,

CLENDON H. LEE,
Counsel for Petitioners.

January 1968.

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PETITION FOR REHEARING

The intervening circumstance of substantial importance relied upon by petitioner is the grant of certiorari in No. 486, *Stern* v. *South Chester Tube Company,* (3 Cir.) 378

F. 2d 205. Petitioner believes that the granting of such petition provides a substantial and persuasive ground for the granting of this petition for rehearing and for issuance of the writ of certiorari herein, and that this case should be set down for hearing on the merits together with the hearing on the merits of No. 486.

The common demoninator of this case (No. 366) and the *Stern* case (No. 486) is whether mere nomenclature can in the federal court defeat substantive rights under state corporation law.

In this case (No. 366) petitioner has an absolute right in this derivative stockholders' action to security for expenses with respect to state law claims, N. Y. Bus. Corp. Law, Sec. 627 (9 McKinney's Cons. L. of N. Y., Sec. 627), *Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U. S. 541.

In the *Stern* case (No. 486) there is an absolute state right in substantive law to examine corporate records. 15 Purdon's Statutes, Sec. 2852-308.

In this case (No. 366), an initial label of "pendent jurisdiction" has been sufficient to defeat petitioner's absolute state right to security with respect to the state claim, even though additional purported federal claims cannot "derive from a common nucleus of operative fact" with the state claim which is the real gist of the action. *United Mine Workers* v. *Gibbs,* 383 U. S. 715, 725.

In the *Stern* case (No. 486) a divided court below held that the label in the substantive statute, couched in the vestigial parlance of mandamus, ousted the district court of jurisdiction.

Thus, both cases squarely raise "outcome-determinative" issues in the application of the Rules of Decision Act, 28 U.S.C. 1652, and squarely raise the issue how far *Erie R.R. Co.* v. *Tompkins,* 304 U. S. 64, may be eroded by

lower courts, the result of which erosion is to determine the outcome of a substantive state issue precisely the opposite in the federal court from its necessary determination in the state court.

The nine itemized subdivisions of paragraph "5"* of the complaint herein (requiring two full pages of print at pp. 15a-17a of the appendix to our petition) purport to allege only a New York common law claim of violation by directors of fiduciary obligation with respect to the investment advisory fee paid.

The Securities and Exchange Commission has itself explicitly recognized that actions with respect to advisory fees paid by investment companies are governed solely by "applicable state law" (see petition, pp. 15-16).**

All that follows paragraph "5"* in the complaint relates to wholly different operative facts which respondents allege give rise to federal claims. Even, however, assuming the sufficiency of the following federal claims, our petition shows that there is no "common nucleus of operative fact" as required by *United Mine Workers* v. *Gibbs, supra,* between and among the state claim in paragraph "5"* and the purported federal claims. Consequently, at the very least, petitioner is entitled to security with respect to the state law claim.

The first paragraph of the original complaint invokes both "common law principles" and "pendent jurisdiction." This single paragraph was amended during the pendency of the motion for security, leaving the remainder of the

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* The state claim is parroted in paragraph "10".

** Since American Investors Fund, Inc. is a "no-load fund," with no sales or redemption charges, with a sustained investment performance record among the best in the world, it is merely a bystander in the current legislative hearings with respect to creating federal jurisdiction over "front-end loads", sales charges, etc.

complaint wholly unaltered (pp. 14a, 25a). See particularly, Lowenfels, *Pendent Jurisdiction and the Federal Securities Acts,* 67 Col. L. Rev. 474 (March 1967).

The necessity of giving prompt and effective recognition of substantive state law was the very reason for holding the decision appealable in *Cohen* v. *Beneficial Industrial Loan Corporation; supra,* because, in speaking of "final disposition on the merits," this Court stated (p. 456):

> "When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."

New York courts have expressly recognized that the substantive right to expenses in derivative actions can be obtained only through security previously furnished, and in no other manner. Thus, it was held in *Amdur* v. *Meyer,* 22 A.D. 2d 655 (1964):

> "In the circumstances of this case the corporation may not recover costs pursuant to Section 627 of the Business Corporation Law—*no security for costs having been given.*" (Emphasis added.)

The denial of security by the district court herein irreparably deprives the petitioner of a substantive state right in the same manner that petitioner in No. 486 has been deprived of a substantive state right. In both cases, the deprivation which alters the outcome has been accomplished under mere labels, contrary to the Rules of Decision Act, *supra, Erie R.R.* v. *Tompkins, supra,* and *Cohen* v. *Beneficial Industrial Loan Corporation, supra.*

CONCLUSION

In the light of the intervening action by this Court in granting certiorari in No. 486, it is respectfully submitted that this petition for rehearing and the petition for a writ of certiorari should be granted and that this case should be set down for hearing on the merits at the same time as the argument in No. 486.

Respectfully submitted,

CLENDON H. LEE,
Counsel for Petitioners.

Of Counsel:
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New York, N. Y. 10005.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Rules of this Court.

CLENDON H. LEE,
Counsel for Petitioner.